

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

CYMEYON HILL,

Plaintiff,

v.

HER, et al.,

Defendants.

No. 2: 22-cv-1849 KJM KJN P

FINDINGS AND RECOMMENDATIONS

Plaintiff is a civil detainee, proceeding without counsel, with a civil rights action. For the reasons stated herein, the undersigned recommends that this action be dismissed based on plaintiff's failure to respond to the February 16, 2023 order directing plaintiff to file further briefing in support of his application to proceed in forma pauperis.

On December 8, 2022, the undersigned recommended that plaintiff's application to proceed in forma pauperis be denied. (ECF No. 10.) On February 10, 2023, the Honorable Kimberly J. Mueller declined to adopt the December 8, 2022 findings and recommendations. (ECF No. 12.) Judge Mueller found that the undersigned applied an incorrect standard in evaluating plaintiff's application to proceed in forma pauperis. (*Id.*)

In accordance with Judge Mueller's February 10, 2023, order, on February 16, 2023, the undersigned ordered plaintiff to file further briefing in support of his application to proceed in forma pauperis. (ECF No. 13.) In particular, the undersigned ordered plaintiff to address: 1) the

1 source of the funds for the initial balance in his inmate trust account on April 1, 2022; 2) the  
2 source(s) of the three deposits to his inmate trust account on April 20, 2022, and whether he  
3 receives income regularly from these sources; and 3) the source of the \$200 deposit made via  
4 JPAY on June 14, 2022. (Id. at 4-5.) The undersigned ordered plaintiff to file this briefing within  
5 fourteen days. (Id. at 5.)

6 On March 20, 2023, the February 16, 2023 order was returned unserved. On March 23,  
7 2023, the Clerk of the Court reserved the February 16, 2023 order. The reserved order was not  
8 returned.<sup>1</sup> Twenty-one days passed from March 23, 2023, and plaintiff did not file the further  
9 briefing as ordered.

10 “Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss an  
11 action for failure to comply with any order of the court.” Ferdik v. Bonzelet, 963 F.2d 1258,  
12 1260 (9th Cir. 1992). “In determining whether to dismiss a case for failure to comply with a  
13 court order the district court must weigh five factors including: ‘(1) the public’s interest in  
14 expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of  
15 prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits;  
16 and (5) the availability of less drastic alternatives.’” Ferdik, 963 F.2d at 1260-61 (quoting  
17 Thompson v. Housing Auth., 782 F.2d 829, 831 (9th Cir. 1986)); see also Ghazali v. Moran, 46  
18 F.3d 52, 53 (9th Cir. 1995).

19 In determining to recommend that this action be dismissed, the undersigned considers the  
20 five factors set forth in Ferdik. Here, as in Ferdik, the first two factors support dismissal of this  
21 action. The court cannot evaluate plaintiff’s application to proceed in forma pauperis without the  
22 information discussed in the February 16, 2023 order. This action cannot proceed until the court  
23 is able to rule on plaintiff’s application to proceed in forma pauperis. Plaintiff’s failure to  
24 respond to the February 16, 2023 delays resolution of this action and interferes with the court’s  
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26 <sup>1</sup> The Clerk of the Court did not include plaintiff’s unit number at Patton State Hospital in  
27 plaintiff’s address on the order served February 16, 2023, and returned unserved on March 20,  
28 2023. The address on which the Clerk of the Court reserved plaintiff with the February 16, 2023  
order on March 23, 2023, included plaintiff’s unit number at Patton State Hospital. This re-  
served order has not been returned.

1 ability to manage its docket.

2 Because no defendants have yet been served, the undersigned cannot evaluate prejudice to  
3 defendants.


4 The fifth factor also favors dismissal. The undersigned granted plaintiff adequate  
5 opportunity to respond to the February 16, 2023 order. As stated above, this action cannot  
6 proceed until the court is able to evaluate plaintiff's in forma pauperis application. For these  
7 reasons, the undersigned finds no suitable alternative to dismissal of this action.

8 The fourth factor, public policy favoring disposition of cases on their merits, weighs  
9 against dismissal of this action as a sanction. However, for the reasons set forth supra, the first,  
10 second and fifth factors strongly support dismissal. Under the circumstances of this case, those  
11 factors outweigh the general public policy favoring disposition of cases on their merits. See  
12 Ferdik, 963 F.2d at 1263.

13 Accordingly, IT IS HEREBY RECOMMENDED that this action be dismissed.

14 These findings and recommendations are submitted to the United States District Judge  
15 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
16 after being served with these findings and recommendations, plaintiff may file written objections  
17 with the court and serve a copy on all parties. Such a document should be captioned  
18 "Objections to Magistrate Judge's Findings and Recommendations." Plaintiff is advised that  
19 failure to file objections within the specified time may waive the right to appeal the District  
20 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

21 Dated: April 28, 2023

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23 KENDALL J. NEWMAN  
24 UNITED STATES MAGISTRATE JUDGE  
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